No. 15238

United States Court of Appeals
For the Ninth Circuit

WESTERN MACHINERY COMPANY, a corporation,
Appellant,

vs.

NORTHWESTERN IMPROVEMENT CO., a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

DEAN H. EASTMAN
ROGER J. CROSBY
Attorneys for Appellee.

909 Smith Tower,
Seattle 4, Washington.

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant's statement of the case is very incomplete and appellee believes, in some major respects, inaccurate. Therefore, appellee deems it necessary to a proper understanding of the issues to make a more complete statement.

The appellee was the manager of a coal mine located at Bellingham, Washington, which was owned by the Bellingham Coal Mines Company, hereinafter referred to as the Coal Company. Appellee was paid only for the actual time that its supervisory personnel spent in managing the mine and for material furnished from appellee's stock of material, plus twenty per cent. Appellee received nothing for equipment purchased directly by the Coal Company or for labor hired by the

Coal Company. With specific reference to the purchase of the equipment, which resulted in the instant suit, the appellee did not receive, nor was it entitled to receive, any commission or "monetary gain" by reason of the purchase of that equipment (R. 175, 193-196, 200).

Appellant asserted in its brief that appellee was entitled to be repaid for all expenses of the Coal Company's mining operation, plus 20 per cent. Such is not the case, and specifically in regard to the equipment in issue, appellee was not entitled to make any profit whatsoever from the purchase of that equipment from appellant (R. 200).

Mr. Huckaba, the sales representative for appellant, contacted Mr. McMillan, an employee of appellee, who was supervising the mining operation for the Coal Company, and proposed that appellant furnish the coal-washing plant which was installed in the Coal Company's mine. Mr. Huckaba's first contact was made in the early part of January, 1952. During preliminary negotiations, Mr. Huckaba and Mr. McMillan made several trips to the Coal Company's mine at Bellingham (R. 54; Ex. A-2). At that time Mr. Huckaba was advised of appellee's relationship with the Coal Company. Also, Mr. Huckaba was fully aware that the equipment was for the Coal Company and that any purchase of a coal-washing plant would have to be approved by the Board of Directors of the Coal Company (Ex. A-2, A-3). During the negotiations, Mr. Huckaba sent written reports to his employer advising the appellant that the Coal Company's Board of Directors would have to give the "go ahead" for any order and

even kept track of the Coal Company's meeting dates when the matter was to be considered (Ex. A-2, A-3).

The preliminary negotiations resulted in a quotation being made to the Coal Company on January 16, 1952 (Ex. A-11). That quotation did not ripen into an order, and Mr. Huckaba was advised that because of a postponed Directors' meeting of the Coal Company it was not possible to get the Board's approval (Ex. A-12). Mr. Huckaba, on January 23, 1952, also advised his home office by an interoffice communication that "Mr. McMillan * * * would not overstep his authority by placing this [order] without meeting with the Board of Bellingham Coal Company" (Ex. A-1). Later, after the Coal Company approved the purchase, Mr. Huckaba submitted a second quotation dated February 20, 1952 (Ex. 1). That quotation was originally submitted to the Coal Company. However, since a credit investigation of the Coal Company would delay delivery, Mr. Huckaba asked Mr. McMillan if appellee's name could be substituted for the Coal Company's on the quotation, Exhibit 1, for credit purposes (R. 130, 174). The reason for this substitution of name was testified to by both Mr. Huckaba and Mr. McMillan and was uncontroverted. At that time it was definitely understood between those two gentlemen, who were the only negotiating persons, that the "equipment was being purchased for the Bellingham Coal Mines Company and that the Bellingham Coal Mines Company would pay for it" (R. 174).

The quotation was followed by an acceptance letter dated February 25, 1952, from Mr. McMillan to Mr.

Huckaba, in which Mr. McMillan set out in writing that the "equipment is being bought for the Bellingham Coal Mines Company at Bellingham, Washington, for which Northwestern Improvement Company is the operating manager, and as such, has been duly authorized by the former to purchase this equipment. * * * the latter [Coal] Company is adequately financed and fully responsible for any commitments they may make at this time" (Ex. 2).

The appellant itself supplied a portion of the equipment, and other parts were furnished by suppliers. The latter were advised by appellant to ship the equipment, with the Coal Company as consignee (Ex. A-16, A-17). After the coal-washing plant was installed, appellant took an acknowledgment from the Coal Company alone, certifying to the satisfactory mechanical performance of the equipment (Ex. A-14).

As various shipments of the equipment were sent to Bellingham from April 30th through July 3rd, 1952, when the final shipment was made, the appellant sent bills covering each partial shipment, and demands were promptly made of the Coal Company for payment (Ex. 3, 4, A-5, A-8; R. 146, 202, 238). When payment was not forthcoming, appellant made attempts to obtain from the Coal Company a conditional sales contract or chattel mortgage covering the equipment (R. 146, 202, 238; Ex. A-5). Appellant did not ask appellee to give a contract or mortgage.

The Coal Company made a $15,000 payment on August 15, 1952, but refused to give a contract or mortgage (Ex. A-5). Later, on August 23, 1952, as a result

of negotiations solely between Mr. Barshell, Secretary-Comptroller of the appellant, and Mr. Little, director and attorney of the Coal Company, the Coal Company gave a ninety-day promissory note (Ex. A-6) to the appellant (R. 204; Ex. A-9). The evidence is uncontroverted that during all of the demands for and discussions concerning the giving of a promissory note, the appellant did not at any time ask that the appellee become a party to the note, nor was the appellee's name even mentioned (R. 159, 204, 237).

Appellant has asserted in its brief that the note given by the Coal Company to appellant was arranged by Mr. McMillan. The record is very clear that, although Mr. McMillan knew of the note, such was arranged between the attorney for the Coal Company and the appellant. It was also asserted that Mr. McMillan went to California to get the extension of time for payment which resulted in the giving of a promissory note. Again, the record is very specific that Mr. McMillan went to California several months after the note was given and even after the thirty-day extension which was granted on the note (R. 159-161; Ex. A-18). Upon taking the note, the appellant closed out an open account in the name of the appellee and opened a notes receivable account in the name of the Coal Company. The note was then assigned to appellant's bank (Exs. A-7, A-8; R. 216, 217). When the note was not timely paid, the appellant, on November 17, 1952, granted to the Coal Company a thirty-day extension on the note (Ex. A-18).

After the Coal Company made several payments on the note, the Coal Company was liquidated through

bankruptcy proceedings (R. 177). Appellant did not make any contention that appellee was obligated to pay for the coal-washing plant until March of 1953 when Mr. Shapiro, attorney for appellant, advised Mr. McMillan that possibly the appellee might be liable for the debt (R. 162, 206).

Appellant has asserted throughout its brief that the appellee was a wholly-owned subsidiary of the Northern Pacific Railway Company. The transcript of record is completely void of any such contention except a statement of appellant's counsel in his closing argument, at which time he referred to the letterhead of an exhibit which had not been mentioned during the trial.

ARGUMENT

Since appellant's argument does not follow its specifications of error, this brief will likewise not be directed toward any particular specification of error, but for the sake of clarity, will be outlined to answer appellant's several arguments in the order in which they appear in its brief.

A. Parol Evidence Is Admissible to Show a Contemporaneous Parol Contract

Appellant contends that parol evidence should not have been admitted to show that appellee is, in fact, a surety. In support of its position, it cited *Karatofski v. Hampton,* 135 Wash. 139, 237 Pac. 17, where the court was confronted with a contract which, by an express recital, made certain parties principals who were contending to be sureties. Because of that express provision, the case squarely fell within the terms of the

parol evidence rule. The facts of this case, however, bring it within a well-established exception to the rule which permits proof of a parol contemporaneous agreement, which was the moving cause of the written contract. The Washington Supreme Court said in *McGregor v. First Farmers-Merchants Bank & Trust Company,* 180 Wash. 441, 40 P.(2d) 144, 147, that the exception is "as firmly established as the rule itself." In that case the court permitted the holder of a cashier's check to show by parol evidence that the check was intended to be a receipt for funds held in trust by the bank. After discussing the parol evidence rule and many leading authorities, the court stated:

> " * * * that, where a parol contemporaneous agreement is the inducing and moving cause of a written contract, or where a parol agreement forms part of the consideration for a written contract, and it appears that the written contract was executed on the faith of the parol contract or representations, then such evidence is admissible. 3 Jones on Evidence (2d Ed.), Sec. 1492."
>
> * * * * * * * * *
>
> "Although an agreement between parties is reduced to writing, the law does not merge into the writing prior or contemporaneous agreements which are distinct, valid, and not in conflict with the writing. 3 Jones on Evidence (2d Ed.), Sec. 1440, p. 2712." (40 P.(2d) 147)

The explicit and uncontroverted evidence in this case proves a parol contemporaneous agreement between appellant and appellee made at the time Mr. McMillan received Exhibit 1, the price quotation, that appellee was to be a surety only. This case is not diffi-

cult to fit within the exception since both the quotation (Ex. 1) having the name change and the confirming letter (Ex. 2) show the intent of the parties and are fully consistent with the contemporaneous parol agreement. Exhibit 2, which was an essential part of the agreement, was very explicit in advising appellant that the equipment was

> "being bought for the Bellingham Coal Mines Company, and that the appellee had been duly authorized by the former [Coal Company] to purchase this equipment."

It further stated that the Coal Company was

> "fully responsible for any commitments they may make at this time."

Mr. McMillan and Mr. Huckaba both testified that the appellee's agreeing to be a surety was the motivating and moving cause of the change in the name on Exhibit 1, and thus, the execution of the purchase agreement in its final form (R. 130, 174).

In the very recent case of *Buyken v. Ertner,* 33 Wn. (2d) 334, 205 P.(2d) 628, 129 A.L.R. 673, the Washington court reaffirmed the use of the exception to the parol evidence rule which it then referred to as the "collateral contract" doctrine.

> " * * * the doctrine of 'collateral contract,' * * *, which, briefly stated, is that parol evidence does not affect a purely collateral contract, distinct from, and independent of, the written agreement, and, consequently such separate and independent contract between the parties may be proved by parol.
>
> "This principle is comprehensively, yet succinctly, enunciated in 32 C.J.S., Evidence, Sec. 997, p. 970, in the following paragraph:

" 'The rule excluding parol evidence to vary or contradict a writing does not extend so far as to preclude the admission of extrinsic evidence to show a valid prior or contemporaneous collateral parol agreement between the parties, which is separate and distinct from, and independent of, the written instrument, has not been merged in, or superseded by, such instrument, and does not contradict, conflict with, or vary the express or implied provisions thereof or deal with a definite and particular subject matter which the written instrument expressly or impliedly undertakes to cover.'

"Our decisions are in accord with the principle last above expressed." (205 P.(2d) 634)

The Washington court very early applied this "collateral contract" exception to a suretyship case. The case of *Amalgamated Gold Mines Company v. Ridgely,* 100 Wash. 99, 170 Pac. 355, recognized that evidence proving that one party to a contract is a surety and that a second party, not a signator to such contract, is in fact the principal, is admissible as an exception to the parol evidence rule. As authority for the decision in the *Amalgamated Gold Mines* case, *supra,* the Washington court cited *Hoffman v. Habighorst,* 38 Ore. 261, 63 Pac. 610, 53 L.R.A. 908. The Ninth Circuit, in the case of *Howell v. War Finance Corporation,* 71 F. (2d) 237, 243, said the *Hoffman* case, *supra,* is the leading authority on the subject. The Ninth Circuit, in the *Howell* case, *supra,* at page 243, found that

" * * * when the parties to a contract know that one of them is a surety, such a fact may be shown by parol."

Both the *Howell* case, *supra,* and the *Hoffman* case, *supra,* were instances where a borrower obtained a loan from a creditor, who at the time of the transaction was well aware that the funds were for the benefit of a third party who was not present and who did not sign the written loan agreement. Yet, in each instance, the court permitted parol evidence to be introduced over the objection of the creditor to show that borrower was, in fact, a surety rather than a principal. In the *Hoffman* case, *supra,* the borrowers were stockholders of a corporation for which the money was borrowed and the court held at page 612 that:

> "The admission of parol evidence to show the true relationship of the makers of a promissory note, and that the payee had notice thereof, does not alter or vary the terms of the original contract, or affect its integrity. It is merely proof of an independent or collateral fact, * * *. 'The fact that one debtor is a surety for the other is no part of the contract with the creditor,' says Mr. Chief Justice Gray, 'but is a collateral fact showing the relation between the debtors; and, if it does not appear on the face of the instrument, this fact, and notice of it to the creditor, may be proved by extrinsic evidence.' "

The *Hoffman* case, *supra,* at page 612, and the *Howell* case, *supra,* at page 243, both stated that such fact of suretyship could be shown "although the name of the principal does not appear in the instrument which constitutes the evidence of the debt."

The evidence which appellant contends was admitted in violation of the parol evidence rule was not admitted to vary the terms of the purchase agreement, but

was properly admitted by the trial court for the specific purpose of proving that appellee is a surety and the Coal Company is the principal for the debt involved in this case.

B. Appellee Is a Surety Rather Than a Principal

At the trial appellant strongly contended and the court found in Finding of Fact II (R. 10) that the agreement to purchase and sell the coal-washing plant was founded upon two written documents, *i.e.,* the price quotation, Exhibit 1, and the written acceptance, Exhibit 2 (R. 28, 46). In making its argument that appellee is a principal, appellant, without explicitly so stating, is endeavoring to retract from its former position and build a case on the theory that the quotation alone constituted the contract. Obviously, the reason that appellant now desires to disregard the acceptance is because of the references made to the Coal Company by Mr. McMillan in that letter. Later, however, after appellant passed the discussion about who is a principal and discussed consideration, it referred to Mr. McMillan's routing request in the acceptance as the consideration for the execution of the contract. The two positions are inconsistent because, contending that the routing request is part of the consideration is also admitting that the acceptance, wherein the routing request is made, is part of the contract. The routing request was certainly not referred to in the quotation which amounted to only an offer.

The acceptance, of course, cannot be disregarded since it is a necessary part of the contract. The important wording of the acceptance has been quoted hereto-

fore, but it is important to again point out that it leaves no room for speculation as to why the equipment was being purchased. On the witness stand, Mr. Huckaba very explicitly admitted that he knew the equipment was for the Coal Company (R. 97, 102) and his report to his home office showed the approval for the purchase had to come from the Board of Directors of the Coal Company (Exs. A-1, A-2, A-3). The quotation (Ex. 1), itself, shows it was originally made to the Coal Company. It was only at the last minute that the quotation was changed to show the appellee and then merely for credit purposes (R. 130, 174). At that time, however, it was agreed that the Coal Company would pay for the equipment (R. 174).

On the question of whether the routing request was part of the consideration for the contract, entirely different legal questions are presented. First, is that request a part of the purchase contract itself, or merely a gratuitous remark that was outside of the contract and, therefore, nothing upon which consideration could be based? The quotation does not mention the Northern Pacific and neither is the acceptance contingent upon the routing. The routing request did nothing more than ask for voluntary action on the part of appellant. Even appellant, on line 4, page 24, of its brief, acknowledges that appellant was under no legal obligation to honor the request. Consequently, it could not be part of the consideration for the agreement. Even the trial judge was surprised during oral argument when the name of the Northern Pacific was linked with the subject of consideration (R. 18).

Assuming, however, for the sake of argument, that the appellee, is a wholly-owned subsidiary of the Northern Pacific, appellant has failed to show from the record how appellee, itself, derived any benefit from Mr. McMillan's mere request. On the other hand, there was considerable positive testimony that the appellee derived no benefit from the purchase, and, particularly, appellee was not entitled, as appellant implies in its brief, to any twenty per cent commission on the purchase of appellant's equipment (R. 193-6, 200).

Appellant, also, argues that the finding and conclusion relative to lack of consideration must be wrong since the court found appellee obligated as a surety. Appellant is confusing legal consideration, which is discussed by appellant's authorities as a basis for obligating a party under a contract, and actual benefit or monetary gain which a party may receive for becoming a paid surety. Clearly, a surety may be obligated to the creditor for various legal reasons, but still the surety can be a gratuitous surety who derived no actual benefit. It was appellee's position that it fell in the latter category, and appellant, although well aware of appellee's contention by affirmative defenses, put nothing in the record to refute appellee's well-supported position at the trial that, if it was in fact a surety, it was a gratuitous surety. Appellant has cited nothing in the record to substantiate its argument that appellee received some actual consideration for its becoming a surety, and this is understandable since appellee received none.

Mr. Huckaba knew, and communicated to appellant's home office, that he was dealing with the Coal Company

through Mr. McMillan. He felt the actions of the Board of Directors of the Coal Company concerning the proposed purchase were important enough to convey to his superiors, and did so on more than one occasion, as is shown on Exhibits A-1, A-2 and A-3. Up until the final moment that the last quotation was made, appellant did not concern itself with the appellee's desires as to whether the equipment should be ordered. It was only concerned with getting the Coal Company's approval. Then a quotation, which was originally made to the Coal Company, was changed for only one object, and that was, as the trial judge found, for credit purposes. The change was made by laymen who were not familiar with the niceties of law. However, Mr. McMillan, in his acceptance (Ex. 2), left no doubt as to who was purchasing the equipment and who authorized the purchase. Consequently, the evidence leads only to the conclusion that the Coal Company was the principal and obligated by the contract, and that appellee was only a surety.

C. Appellee Was Discharged Because Appellant Extended Time for Payment of the Principal's Obligation Without the Consent of Appellee

1. Appellant agreed that appellee would be a surety.

Appellant made an extensive argument discussing the requirement that a creditor be advised that a party is a surety. However, it has always been appellee's position that if it is obligated appellee became a surety at the time of the sale by reason of its negotiations and agreement with appellant, and at that time appellant was completely aware of appellee's position. Mr. Huck-

aba, the appellant's agent, participated in making the parol contract that made appellee a surety. The evidence showing Mr. Huckaba's full assent to the surety relationship has been previously discussed. Mr. Huckaba knew that Mr. McMillan was the agent for the Coal Company, and the quotation was originally made out to that company. Appellant acknowledged the relationship by taking the acceptance of the equipment from the Coal Company (Ex. A-14). Furthermore, shortly after delivery of the equipment, appellant requested a contract of sale or mortgage from the Coal Company, and most important, a promissory note was requested of the Coal Company alone, with no request being made of the appellee. Therefore, when appellant claims ignorance of the full picture, it is arbitrarily refusing to acknowledge the unquestioned testimony and record of this case.

Appellant is using blinders when it states that the arrangement was never brought to its attention or assented to by it, or that the Coal Company was not responsible for the purchase of the machinery which the Coal Company's Board of Directors, with the knowledge of appellant, ordered its agent, McMillan, to make.

2. Appellee was not a compensated surety.

Appellant's argument that appellee was a compensated surety is based upon the same grounds as its argument that appellee was a principal debtor, and nothing would be gained in again pointing out the reference to the record which conclusively proves that appellee received no consideration whatsoever for obligating itself as surety if, in fact, it was obligated at all. Appel-

lant has cited the case of *Holmes v. Elder,* 170 Tenn. 257, 94 S.W.(2d) 390, to substantiate its position. That case, however, is not in point as the court, in that case, explicitly stated that the *only* issue was whether a guarantee of a bank deposit continued during successive terms of an elective official or must be renewed at the end of each term.

3. There was an extension of time.

Appellant has endeavored to argue that the payments for the machinery were not due until fixed by the terms of the promissory note. If this theory were carried through to its logical conclusion, which is, that the only document covering liability for payment is the promissory note, then the appellee is not bound in any capacity. Clearly, however, counsel for appellant are disregarding the abundant evidence in the case establishing the debt as an open account. The provision on the back of the quotation (Ex. 1) indicates payment is to be made at time of shipment. The billings which accompanied each partial shipment stated the amount due for each partial shipment, including the sales tax therefor. Exhibits 3 and 7, and also the invoices themselves, stated under "terms" that payment was to be made by the 10th of the month. Furthermore, appellant set up an open account showing balances due after each shipment. If the appellant had felt that the balance was not due, as invoiced, it would not have billed and set up the sales tax separately, but rather sent one invoice showing total purchase price and total sales tax. Also, the invoice would have carried some other provision under "terms." Unquestionable proof that appellant

considered the account to be due long before November 20, 1952, was its insistence on payment which resulted in the Coal Company paying $15,000 on August 15, 1952, prior to the request for the promissory note (R. 183, Ex. A-5).

Appellee does not disagree with appellant's citations to the effect that a surety is not discharged unless the concession to the principal extends the time of payment. Clearly, the citations refer to instances such as bank deposits and other situations where the obligation has no maturity date. Such cases have no relevancy to the issue in question.

4. There was a binding agreement extending the time for payment.

Appellant maintains that because the note was payable *on or before* a certain date, which permitted the Coal Company to discharge the debt at any time, there was, in fact, no valid agreement extending the time of payment. Appellant cited several authorities and cases which dealt with indefinite agreements, but did not discuss any cases directly in point. Also, more important, appellant did not cite the Washington case which has decided this very problem adversely to appellant's contention.

In *Yakima Hardware Co. v. Strickler,* 164 Wash. 155, 2 P.(2d) 90, the plaintiff, which was the payee on a promissory note from Kennewick Hardware Company, on which note defendant was a surety, joined with other creditors of Kennewick Hardware in agreeing to withhold collection of their past due accounts, and in return

took from Kennewick Hardware an agreement for payment which read as follows:

> "Payment of *at least* 5% on the total of all claims listed as of April 1, 1927 shall be made *on or before* the 30th of each month, beginning May 30, 1927 * * *." (2 P.(2d) 90) (Emphasis supplied)

When Kennewick Hardware defaulted on its new agreement to the creditors, the payee brought the action against the surety on the old promissory note. The lower court held that the new agreement constituted an extension of time, releasing the surety defendant. The payee appealed, and one of its principal contentions was that the trial court erred in finding that the new agreement provided a valid extension of time for a consideration so as to relieve the surety from her liability. The Washington Supreme Court sustained the lower court's position and ruled that, even though the creditor, Kennewick Hardware Company, could have paid the whole debt at any time, such

> "element of definiteness of time, with reference to the binding effect of a contract such as this, is determined, not by reference to the choice or option given to the debtor, but by reference to the suspension of the creditor's right of action or demand. Here the creditor's right was definite, that is, 5 per cent per month, similar to a note payable on or before a given date, which may be paid at once but gives no right of action prior to the given date and yet sufficiently definite as to the element of time to constitute a valid obligation." (2 P.(2d) 92)

Appellant, to sustain its position, cited *Van de Ven v. Overlook Mining & Development Company,* 146 Wash.

332, 262 Pac. 981. In that case the payee merely wrote on the back of the promissory note that he would permit payment to be made *on or before* 6 months from the date of his notation. The court found that the notation for extension of time, on the face of it, did not provide any consideration. It did not, however, say that an extension agreement couched in such language could not provide a binding extension agreement. As later stated by the *Yakima Hardware Company* case, *supra,* if there is legal consideration for an extension agreement, the mere fact that the principal can come in and pay up the obligation at any time and thus avoid any further interest does not mean that the agreement is without valid consideration or not binding upon the parties.

Stern's Law of Suretyship, 5th Edition, 136, and 50 Am. Jur. 946, which were cited by appellant on the same point, rely exclusively for their statements that an "on or before" payment agreement has a lack of mutuality, on 85 A.L.R. 330, which in turn relies upon some language in *Tsesmelis v. Sinton State Bank,* 53 S.W.(2d) 461, 85 A.L.R. 319. The latter case, however, involved facts very similar to the *Van de Ven* case, *supra,* in which there was a mere forbearance rather than a definite agreement to extend the time of payment. In that case, the pertinent language read as follows:

> "We do not care to extend the old note, but will hold the time of payment in abeyance as above stated."

There was no question but that the court was correct when it held that the negotiations did not result in a valid contract of extension.

Since the law in Washington is expressed by the

Yakima Hardware Company case, *supra,* to the effect that an extension agreement discharging a surety may provide for payment on or before a date certain, the only remaining question in the case before the court is whether the note given by the Coal Company was supported by consideration.

The statutory law in the State of Washington provides that

> "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration;" R.C.W. 62.01.024.

and that

> "Value is any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." R.C.W. 62.01.025.

Corpus Juris Secundum, in its discussion of consideration necessary to support a promissory note, states that

> "Some valid or valuable consideration is all that the law requires to support the undertaking of a party to a bill or note. If such a consideration exists its adequacy or sufficiency as compared to the value of the thing promised is ordinarily immaterial, in the absence of fraud, mistake or undue influence. The undertaking may be supported by a consideration of a most trifling nature or a consideration having 'no value' in the monetary sense; and it is in no way requisite that the consideration for a bill or note be adequate in value to the face amount of the instrument." 10 C.J.S. 603, Sec. 148c.
>
> * * *
>
> "Although it has been said that an agreement

> for forbearance should be for a definite time, ordinarily, the shortness of the time for which the forbearance or the suspension of the right to sue exists does not prevent it from being a valuable consideration, and a forbearance or an agreement for forbearance for a reasonable length of time is sufficient." 10 C.J.S. 622, Sec. 151g (3).

In several instances the Washington court has discussed valid consideration and has held that several factors present in the instant case constitute valid consideration for the execution and acceptance of a promissory note. In the very recent case of *Seattle Association of Credit Men v. American Alliance Aluminum Smelting Corporation,* 42 Wn.(2d) 636, 257 P.(2d) 637, 140 A.L.R. 1042, the court stated the rule

> "that forbearance to sue for a past due obligation is consideration for a new note and mortgage." (257 P.(2d) 640).

In that case, Morley Magnesium Foundries executed a $100,000 note to the plaintiff to cover a past indebtedness, and, as a defense to the suit to enforce collection, contended that a past consideration is inadequate to support a note. With the former statement, the court held for the plaintiff. To support its position in the *Seattle Association* case, *supra,* the court cited a much earlier case of *Shrive v. Crabtree, Inc.,* 149 Wash. 500, 271 Pac. 329. In that case the plaintiff likewise took a note for past due accounts which provided for periodic payments. The defendant contended that there was no consideration for the note. However, the Washington Supreme Court found that the mere extension of time constituted consideration and made the following statement:

> "From the facts stated, it appears that, when the note was taken, there was an extension of the time of payment of the debts then due. The first question is whether this was a sufficient consideration for the note. The rule is that the extension of time for payment of a debt is a sufficient consideration for a bill or note of the debtor. 8 C.J. 236; *Traders' Nat. Bank v. Parker,* 130 N.Y. 415, 29 N.E. 1094; *Thomas & Co. v. Hillis,* 70 Wash. 53, 126 Pac. 62. Applying the rule to the facts of the present case, it must be held that the note was supported by a valid consideration." (271 Pac. 329)

Also see *Katz v. Judd,* 108 Wash. 557, 559, 185 Pac. 613. Since, in this case, the plaintiff took a promissory note from the Coal Company covering a past due obligation, that of itself constituted consideration.

There was still, however, other consideration to be found for the execution of the note. The note (Ex. A-6) provides for the promisor to pay costs and disbursements and a reasonable attorney's fee in the event it is necessary to bring an action to enforce collection. There is no question but what the appellant by the taking of the promissory note, enlarged its rights against the Coal Company and put itself in a substantially better position than it had by the mere open account. The authorities agree that the giving or taking of some additional right, such as payment of attorney's fees, constitutes a consideration for the giving of an extension of time.

> " * * * the surety will be discharged where the extension of time is in consideration of the principal's giving additional security for the debt, or waiving an exemption, or an agreement to pay at-

torney's fees as to the unpaid part of the debt." Stern's Law of Suretyship, 5th Edition, 139.

"An undertaking to pay attorneys' fees on the unpaid part of a note would clearly seem to constitute a sufficient consideration for an agreement by the holder to extend the time of payment. *Lee v. Lewis* (1926; Tex. Civ. App.) 287 S.W. 115 (affirmed in 1927) ..... Tex. ....., 298 S.W. 408)." 85 A.L.R. 330.

The element of interest in the note also constitutes consideration for its execution. The appellant contended in its brief that the agreement to pay interest on the note did not constitute consideration. However, there seemed to be two important factors that were overlooked. In the first place, appellant's comptroller testified at the trial that it was not entitled to charge interest on the open account (R. 78). Thus, it is appellee's position that the Coal Company's agreement to pay interest at 5 per cent constituted consideration and greatly benefited appellant's position. On the other hand, even assuming that appellant was entitled to collect interest at 6 per cent on the open account, the fact that the Coal Company was only obligated to pay 5 per cent on the promissory note would constitute consideration since the Coal Company received something of value and the appellant gave up something of value for the execution of the note. The Iowa court, in the case of *Mohn v. Mohn,* 181 Iowa 119, 164 N.W. 341, 345, agreed that

"a sufficient consideration * * * is furnished by the fact that there was a reduction of interest, the old indebtedness drawing 6, while the renewal note drew 5 per cent."

5. Appellee did not consent to the extension of time.

On pages 42 and 43 of appellant's brief, sweeping statements are made to the effect that Mr. McMillan was instrumental in obtaining the extension of time upon which appellee bases its claim of discharge and that Mr. McMillan consented to the issuance of the note. Despite the fact that appellant cited the record as the basis for its statements, appellant has greatly misconstrued questions and answers that have a very clear meaning. As a matter of fact, there is nothing in the record from which can be inferred that Mr. McMillan played any part in obtaining the issuance of the promissory note or had any contact with representatives of the appellant pertaining to the issuance of a note.

A complete reading of the record will reveal the following facts. Before any money was paid by the Coal Company on the open account, an employee of appellant telephoned Mr. McMillan about payment, and at that time Mr. McMillan did discuss a part payment from the Coal Company of $15,000 to $25,000. However, a note with an extension of time for payment was not discussed. (At this point it should be pointed out that, as appellant has so strongly expressed in its brief, mere forbearance is decidedly different than an agreement for a fixed extension date.) During the same conversation, appellant's representative asked that the Coal Company give a conditional sales contract or mortgage on the machinery. By a letter of August 15, 1952 (Ex. A-5), Mr. Ramage, president of the Coal Company, wrote the appellant enclosing $15,000 and advised appellant that the Coal Company would not encumber the

machinery because of the prospect of a government loan. Appellant's next contact about the account was by Mr. Barshell in a telephone conversation with Mr. Little, the Coal Company's attorney. During that conversation a promissory note was discussed *for the first time* and Mr. Little agreed to furnish such a note. Mr. Little testified at the trial that, during his discussion with the appellant concerning the note and extension of time, the appellee was never even mentioned (R. 204, 237). Appellant did not discuss the note with Mr. McMillan and the only relationship Mr. McMillan had with the note was an inquiry from Mr. Little as to the balance due on the open account. Mr. McMillan did not consent to the giving of the promissory note, nor did anyone ask Mr. McMillan if the note should be given.

Appellant states that Mr. McMillan consented to the issuance of the note along with the other members of the Board of the Coal Company and cites page 185 of the record as a basis for that statement. The reading of the record, however, will easily disclose that when Mr. McMillan testified about concurring with the Board of the Coal Company, he was referring to an extension of time for payment on the note itself, which resulted in appellant granting a thirty-day extension on the note (Ex. A18). The exact record (R. 184, 185) reads as follows:

> "Q. Isn't it true also, Mr. McMillan, that after the note was issued and received by Western Machinery Company, that to your knowledge there were several requests for extensions of time for the payment of it after it became due on August the 18th, 1952—November the 18th, 1952?

A. Yes, sir.

Q. And isn't it fact, Mr. McMillan, that on several of those occasions you personally requested Mr. Little to ask for such forbearance on the note?

A. No, sir.

Q. Is it your testimony that you did not personally discuss with Mr. Little and suggest to him or ask that he contact Western Machinery Company or me for further [186] time on the payment of this note?

A. First, I don't understand what you mean by 'personally.' As a member—

Q. I mean vocally through your own mouth, sir."

(Testimony of Earl R. McMillan)

"A. As a member of the Board of Directors of Bellingham Coal Mines Company I concurred in the request of the other members of the Board that extension be granted."

In discussing the law on what action of the surety will prevent his release when the creditor extends the time of payment for the principal, the appellant has again failed to discuss the several Washington cases which are directly in point, but has cited many old English and Canadian cases, together with cases from other jurisdictions which deal with factual patterns that are easily distinguished from this case. Those cases fall within definite categories which should be analyzed. However, first it would be well to review the Washington law where definite rules for this problem have been laid down.

The Washington court has adopted the general rule:

"that a valid agreement between a creditor and the

> principal debtor, extending the time of payment of an indebtedness *without the consent of the surety,* discharges the latter." (Emphasis supplied). *Gillam v. Purdy,* 167 Wash. 659, 9 P.(2d) 1092, 1093. Also see *Lipsett v. Dettering,* 94 Wash. 629, 162 Pac. 1007.

Thus, the Washington court has used the positive phrase of "without the consent of the surety." Such wording calls for affirmative and positive action, and, accordingly, the Washington court, defining what action constitutes consent, has held that the consent must come from something more than passive acquiescence. Rather, it must take some positive action to show consent. It should be noted that the Washington rule differs from some jurisdictions which require the extension to be made "without the *knowledge* or consent" of the surety.

In *Thompson v. Metropolitan Building Company,* 95 Wash. 546, 164 Pac. 222, a creditor contended that the surety was not discharged because the surety was familiar with the new agreement and made no objection thereto. The following quote from that case spells out the Washington rule under a factual pattern which is identical to the instant case:

> "It is urged that plaintiff knew of the composition agreement and the acceptance by defendant of the mortgage company bonds and did not object thereto, but it is well settled that mere silence on the part of a surety, when he is informed of a modification of the contract between his principal and the creditor or that a new obligation has been substituted in lieu of the original one, does not imply assent on his part. In order to bind him to the new

undertaking it is not sufficient that he passively acquiesce; he must actively consent to be bound by the terms of the new agreement. *American Iron & Steel Mfg. Co. v. Beall,* 101 Md. 423, 61 Atl. 629; 4 Ann. Cas. 883; *Edwards v. Coleman,* 6 T.B. Mon. (Ky.) 567; Brandt, Suretyship & Guaranty (3d ed.), §379; 32 Cyc. 161." (164 Pac. 224).

Text writers are also in agreement with the Washington rule, as can be seen from the following quotes from Brandt on Suretyship and Guaranty and American Jurisprudence:

"If the surety knows of the extension at the time it is given, it is not necessary that he should object thereto in order to entitle him to his discharge. And even if he signs the agreement for extension as a witness, that fact will not prevent his discharge by such extension. * * * If he is bound at all, his 'concurrence must bind him by the terms of the new (contract). It is not enough to bind him that he is informed and is passive; he is not required to object or protest; he must actively concur and consent to be bound by the terms of the new agreement.' " 1 Brandt, Suretyship and Guaranty 730, Sec. 379.

"Mere knowledge on the part of the surety that an extension is about to be granted or has been granted the principal is not equivalent to consent, since the law does not impose on him the duty to speak. In other words, the consent of the surety cannot be inferred from his silence or neutrality, but must be evinced by some positive act." 50 Am. Jur. 956, Sec. 72.

Also see *Klise Lumber Company v. Enkema,* 148 Minn. 5, 181 N.W., 201; *Sneed's Executor v. White* (Ky.), 20 Am. Dec. 175, and *Stewart, Administrator, v. Parker,* 55 Geo. Rep., 657.

Mr. McMillan did absolutely nothing to promote the furnishing of the promissory note, nor did he take any part in its execution or delivery. The only connection he had with the note was a telephone call from Mr. Little of the Coal Company ascertaining the amount due. There is testimony which indicates that Mr. McMillan was at a Board of Directors meeting when the note was discussed, but the record does not show that he took any part in such discussions. In any event, it is questionable whether there was a meeting before the note was given since the note was furnished within a couple of days after it was requested by the appellant (Ex. A-9).

The many cases cited by appellant on the problem of consent fall generally into one of the following three categories:

1. The surety requested an extension of time or actively participated in the negotiations to obtain an extension. (Under this category also fall the cases where the surety designated the principal to act as his agent).
2. The original undertaking, to which the surety was a party, provided for a future extension so that at the time the surety was originally bound, he could anticipate that an extension would be made at a later time.
3. The creditor, at the time it took a new agreement extending time of payment, specifically reserved rights against the surety by an agreement that the new note would not terminate the old note, but rather the new note would merely serve as security for the old.

Of those cases cited by appellant, most of them fall within the first category. Those cases coming within that group upon which appellant placed great stress are *Woodcock v. Oxford and Worcester Railway Co.*,

61 Eng. Rep. 551, 1 Drewry 521; *Levy Brothers Co. v. Sole,* 1955 Ontario Weekly Notes 989; *Bulova Watch Co., Ltd. v. Sole,* 1955 Ontario Weekly Notes 989; *Westveer v. Landwehr,* 276 Mich. 326, 267 N.W.849; *Amidon v. Travers Land Co.,* 181 Minn. 249, 232 N.W. 33; and *First Trust Co. v. Airedale Ranch & Cattle Co.,* 136 Neb. 521, 282 N.W. 766. Also in this category is *Moody v. Stubbs,* 94 Kan. 250, 146 Pac. 346, where the surety made the principal his agent so that the principal's action of requesting an extension also became the surety's request. Such a case, however, should not be confused with the agency argument advanced by appellant in which appellant has contended that the appellee, as surety, was acting on behalf of the Coal Company. In this case there is no contention that the Coal Company, which is the principal, ever acted for the appellee in furnishing the promissory note which extended the time of payment. Typical of the cases under the second category are *First Trust Co. v. Airedale Ranch & Cattle Co., supra; Johnson v. Paltzer,* 100 Ill. App. 171; and *Moody v. Stubbs, supra.*

The case of *Wyke v. Rogers,* 42 Eng. Rep. 609, is representative of those cases where the creditor reserved his rights against the surety when taking the extension agreement—the third category.

Although appellant has made erroneous statements of fact which would tend to bring this case within the first category, as has been previously pointed out, any allegations that Mr. McMillan was instrumental in obtaining an extension of time are erroneous and are not borne out by the record. Appellant can cite nothing in the record which shows that appellee actively consented

to be bound by the extension agreement. Mr. McMillan and the appellee did nothing more than passively acquiesce in the furnishing of the promissory note. Consequently, under the rule of the Washington cases, appellee cannot be estopped from asserting the defense that it was released from liability by the extension agreement.

CONCLUSION

The trial court properly admitted parol evidence to prove that appellant knew the Coal Company was the purchaser of a coal-washing plant, and to prove a contemporaneous oral contract between the appellant and appellee under which, if obligated for the purchase of the coal-washing plant, appellee is only a surety and the Coal Company is the principal. Appellee respectfully submits that, if it is a surety, it sustained the burden of proof that by reason of the appellant taking a promissory note from the Coal Company extending the time of payment for the Coal Company's obligation without the consent of appellee or without reserving any rights against appellee, appellee was released from any obligation as a surety to pay the Coal Company's open account.

The findings support the conclusions and the decree of the District Court, and the decree should therefore be affirmed.

Respectfully submitted,

Dean H. Eastman
Roger J. Crosby
Attorneys for Appellee.